COURT OF APPEALS
DECISION
DATED AND RELEASED

March 20, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-2016

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EUGENE F. OLSEN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

EICH, C.J. Eugene Olsen, appearing *pro se*, appeals from an order denying his § 974.06, STATS., motion for relief from a 1988 judgment convicting him of several crimes. In his motion and supporting brief filed in the trial court, Olsen claimed he was entitled to a new trial because: (1) the trial court improperly excused several jurors without making a formal determination that they were being excused for cause; and (2) his trial

counsel was ineffective for failing to object to the jurors' dismissal. He also attempts to raise issues—including one of ineffective counsel in a former appeal—not included in his motion.

We consider his arguments meritless and affirm the order.

In 1988, following a jury trial, Olsen was convicted of armed burglary, first-degree sexual assault, first-degree recklessly endangering another's safety, and possession of a firearm by a felon. He was sentenced, as a repeat offender, to consecutive prison terms totaling fifty-five years. He filed a postconviction motion claiming that the trial court erred in: (1) excusing several prospective jurors who had planned to go on deer-hunting trips; (2) denying his motion for a change of venue due to allegedly prejudicial pretrial publicity; and (3) refusing to instruct the jury on lesser-included offenses. The trial court denied the motion[1] and Olsen appealed to this court.

While we do not have before us the briefs filed in the former appeal, our decision was confined to a single issue: his claim of prejudicial pretrial publicity. Concluding that the trial court did not erroneously exercise its discretion in denying the change-of-venue motion, we affirmed Olsen's conviction. ***State v. Olsen***, No. 89-0916-CR, unpublished slip op. (Wis. Ct. App. Dec. 21, 1989).

In April 1996, Olsen, now appearing *pro se*, moved the trial court for a new trial on grounds that: (1) the court erred in excusing the deer-hunter jurors, and (2) his trial counsel was ineffective in failing to challenge the excusals. In a "Supplement [sic] Motion

[1] In denying Olsen's motion for a new trial "as to all 3 issues," the court said that he had not shown, nor was it probable, that excusing a number of deer hunters means "any class of eligible persons" have been excluded from serving on a jury or that the defendant was denied "a fair trial by his peers." It also noted that Olsen did not object to the excusal of the jurors at jury selection or request a continuance, nor did he show prejudice. With respect to the request for a change of venue, the court said that the record reflected that "anyone who had any actual bias was excused" and all the jurors who sat on the case "stated that they could put aside" whatever pretrial publicity they did hear so that "there was no actual bias against the defendant." Finally, the court ruled that it properly denied Olsen's request for a lesser-included offense jury instruction because the offense was not a lesser-included one under the "elements only" test.

and Brief" filed the same day, he also claimed that one of the jurors was acquainted with his cousin and improperly contacted the cousin to "inquire[] into the[ir] friendship status, if she finds the defendant guilty."

The trial court denied the motion, concluding that because it had previously ruled that it was not error to excuse the prospective jurors, Olsen could not now make a claim that he was in any way prejudiced by his trial attorney's failure to object. On appeal, Olsen repeats his juror-excusal argument, and adds several others: a challenge to his arrest and subsequent search, and a claim that his prior *appellate* counsel was ineffective for failing to raise the juror-excusal issue on the 1988 appeal.

It is hornbook law that an appellate court will not consider arguments raised for the first time on appeal. ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). Because, as indicated, Olsen's motion in the trial court for a new trial dealt only with the juror-excusal issue, we need not consider his attempts to interject new issues into the proceedings at this late date.

As we have said, the trial court rejected Olsen's claim that it erred in excusing the jurors when it denied his 1988 postconviction motion; that decision was never challenged on the appeal that followed. Attempting to circumvent the rule of § 974.06, STATS., and ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994), that a defendant who has pursued a direct appeal from his or her conviction cannot later obtain collateral review of a claim that could have been raised as part of that appeal, unless a "sufficient reason" is shown for the failure to raise it in the earlier proceeding, Olsen's reargument of the issue is dressed in the guise of an ineffective-assistance-of-counsel claim. He argues that his former appellate counsel was ineffective for failing to raise the issue in his 1988 appeal.

We note first that the established procedure for advancing a claim that counsel rendered ineffective assistance in a former appeal is via a petition for writ of habeas corpus filed in this court—a ***Knight*** petition. *See* ***State v. Knight***, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992). Given Olsen's *pro se* status, we will consider his appeal to be such a petition, and consider his claim.[2]

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because representation is not constitutionally ineffective unless both elements of the test are satisfied, ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), *aff'd*, 176 Wis.2d 845, 500 N.W.2d 910 (1993), we may dispose of an ineffective assistance of counsel claim when the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

We are satisfied that Olsen's ineffective-assistance claim must fail, quite simply, because we see no error in the trial court's ruling excusing the jurors. That being

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[2] The attorney general, in a well-researched and thoughtful brief, urges us to take up and consider whether, and if so in what circumstances, a claim of ineffective assistance of appellate counsel can constitute "sufficient reason" under ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994). The supreme court held in ***Escalona-Naranjo*** that, under § 974.06(4), STATS., a defendant who has pursued a direct appeal from conviction cannot obtain collateral review of claims that could have been raised on the direct appeal *unless* he or she demonstrates a "sufficient reason" for failing to raise it on the former appeal. ***Id***. at 186, 517 N.W.2d at 164.

It is an interesting question—one we commented on, but did not decide, in ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 668, 674-75, 556 N.W.2d 136, 139 (Ct. App. 1996). Because the issue is not adequately briefed by this *pro se* appellant, however, and because we are satisfied Olsen has no case on the merits of his claim, we do not reach it here, either.

so, his appellate counsel's failure to raise the issue on the earlier appeal could not have been deficient performance—nor could it have resulted in any prejudice to Olsen.[3]

As the *voir dire* commenced, the trial court indicated that the trial, which was to begin on a Friday, would likely extend into the weekend, and asked the panel whether "jury service on Friday and Saturday of this week [would] be extremely difficult or inconvenient for you." Several panel members raised their hands. One, a college student, was excused because she had an exam, and a second, who said he had plans to go deer hunting on the weekend, was also excused. The court eventually excused a total of thirteen panel members who indicated that they had made deer-hunting plans for the weekend. Other than recognizing the importance of the deer-hunting season to people living in that part of the state, the court made no other "findings" or statements regarding the excusals, and Olsen's trial counsel made no objections to the court's actions.

We agree with Olsen that prospective deer hunters are not within the groups automatically excluded from jury service under relevant statutes.[4] We also agree that the trial court in this case did not consider, on the record and in detail, whether each deer hunter would in fact endure "hardship or inconvenience" should they be required to serve.[5] The

[3] "Prejudice," as that term is used in assessing ineffective-assistance-of-counsel claims, means, in essence, that counsel's errors were so serious as to deprive the defendant of a fair trial—a trial whose result is reliable. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). In other words, errors of counsel actually had an adverse effect on the defense, for not every error that conceivably could have influenced the outcome undermines the reliability of the result in the proceeding. "'[T]here [must be] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** at 129, 449 N.W.2d at 848 (quoted source omitted). Olsen has not made any such showing in this case.

[4] In other words, they were not infirm, or unable to read and understand English, they had not been summoned for jury service within the past two to four years, were not legislators or full-time elected officials, or related to the parties or attorneys. Sections 756.01, 756.02 and 805.08(1), STATS.

[5] Section 756.02(2)(a), STATS., states that persons may be excused from the panel "based on a finding that jury service would entail undue hardship" or entail "extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice."

statutes, however, do not set forth the exclusive grounds for juror excusal. More than a century ago, the Wisconsin Supreme Court upheld a trial court's decision to remove four prospective jurors who, it was felt, possessed only limited understanding of the English language—even though, unlike today, the statutes in existence at that time did not provide for exclusion on that ground. The court stated:

> The causes for excusing jurors, even after their names are drawn for the trial … are so numerous, and involve so many considerations which must be addressed to the discretion of the trial judge, that it cannot well be interfered with by an appellate court without great danger… of doing more injury than good. We think there are very substantial reasons for holding that the excusing or setting aside even a competent and indifferent person could not be grounds for the reversal of a judgment when the record shows that an impartial jury has been impaneled for the trial of the case.

Sutton v. Fox, 55 Wis. 531, 539, 13 N.W. 477, 480 (1882).

The trial court possesses broad discretion in excusing jurors for cause, ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990), *cert. denied*, 498 U.S. 1122 (1991), and we decline to superimpose on that discretionary authority a requirement that its proper exercise is dependent on express and detailed findings. It is important for trial courts to state the reasons underlying their discretionary rulings. ***McCleary v. State***, 49 Wis.2d 263, 280-81, 182 N.W.2d 512, 521 (1971). But "[w]here the trial court fails to adequately explain the reasons for its [discretionary] decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling." ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

In this case, the trial court's concern—plainly implied, if not directly apparent from its remarks—was that deer hunting, with its limited season and its considerable significance to persons in the area, is the type of activity which, if barred to the people responding to the court's questions, might well prove distracting to them should they be required to abandon their plans and serve on the jury. Because that is a

determination a reasonable judge could reach under the facts and circumstances of the case, it is a sustainable exercise of discretion. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Olsen's other arguments consist essentially of a series of general statements that the trial court's action violated several rights guaranteed to him by the constitution, including his "right to the accuracy fact-finding [sic] process," his right to "effective use of his preemptory [sic] challenges," and his right "to a fair and impartial jury." The points he attempts to make are wholly undeveloped and we decline to consider them. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (court of appeals may decline to consider undeveloped arguments supported only by general statements).[6]

Because we do not see how Olsen could suffer prejudice from the failure of his attorney, on his prior appeal, to challenge a ruling of the trial court which we have now upheld, we affirm the trial court's denial of his motion for a new trial.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[6] The same may be said for his claim of improper juror contact. His entire "argument" on the point is contained in a single sentence describing his motion in the trial court as "alleg[ing] that: …. a juror's failure to disclose the fact that she had had an unauthorized contact with defendant's cousin and that the juror failed to disclose this fact to the court after she had been selected for jury service." Nor does he even suggest how the contact could have prejudiced him. First, we have not been directed to any place in the record—and the State says none exists—indicating that information of this purported contact was ever brought to the trial court's attention. Second, the facts Olsen alleges in support of his claim are that the juror asked a member of Olsen's family, with whom she was apparently acquainted, whether their friendship would suffer if she were to find Olsen guilty. If the juror had received an affirmative response she would, presumably, be inclined to vote for Olsen's acquittal, and a negative response would not detract at all from the juror's commitment to consider the case fairly, as she, like the other jurors, promised to do during the *voir dire*.